

## MINORITY RIGHTS AND THE PUBLIC INTEREST

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ONE of the by-products of the effort to win the present war is a growing realization that the members of racial, national and religious minorities in this country can make an important contribution to the production of goods and the fighting of battles. Many who have placidly tolerated discrimination in peacetime now view with considerable alarm the possibility of national suicide as a result of the unwillingness of some business concerns, and to a certain extent of the government and the armed forces themselves, to take advantage of the skill and valor of willing and well qualified Negroes, aliens, Jews, Catholics, and others. They regard with still greater consternation the sinister rumblings of resultant discontent — perhaps fomented or encouraged by enemy agents as a part of the strategy of war — such as were heard in Harlem after the Japanese had started their attack upon white superiority in the Pacific.

While this is not the time to place blame for blame's sake, the occasion is peculiarly appropriate for an analysis of the public stake in the cessation of discrimination against minorities. If such discrimination hurts the community as a whole only in time of crisis, the situation may demand only temporary expedients; it will be enough to open the gates of employment and enlistment for the duration of the war. But if, in peacetime as in wartime, a continuing public interest demands the easing of social tensions created by the existence of a host of minority groups side by side in a single society, now is the time to describe that interest and make it a part of the public consciousness. Just as a single disastrous fire has often stimulated a long needed revision of the fire laws, so the present emergency may dramatize the minorities problem sufficiently to produce a lasting impression on the general mind. Herein lies the main hope for a sane treatment of the problem during and after the trying days of postwar readjustment.

The absence of any general understanding how and why irrational discrimination against unpopular groups hurts the whole community is an astounding fact, but it is a fact. Even those who bear the greatest

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good will toward minority groups, who condemn discrimination as a violation of the rights of man and as one of the important symptoms of "fascism," would in many cases be hard put to it to explain the source of their own good will; or the relationship between the so-called natural rights of individuals and the welfare of the community as a whole; or, indeed, what they mean by "fascism." They have been reared, for the most part, in the equalitarian ideal. But their basic attitude is generally *noblesse oblige*: it simply is not sporting to gang up on a weak and helpless minority group. The purpose of this paper is to collate the teachings of the United States Supreme Court as to the nature of the public interest — of our *self-interest* — in the cessation of discrimination against minorities.

### THE NATURE OF THE PROBLEM

The minorities problem springs from the existence of fairly well defined "out-groups" disliked by those who control the political and other organs of power in society. Such dislike arises not because the members of the groups have done or threatened acts harmful to the community, but because membership in the group is itself considered a cause for distrust or even hostility. These unpopular groups are often called "minorities," and the dominant group "the majority"; and for the sake of convenience that terminology is followed here, even though the "minority" can be and sometimes is a numerical majority.<sup>1</sup>

One of the great obstacles to clear thinking about minorities is the tendency to think in terms of the particular case. The quick surge of angry sympathy for men and women believed to have been wrongly hurt is our noblest badge of civilization, and must not be deprecated even by implication. Too often, however, that very humaneness and good will results in blindness to the fact that the general welfare is involved. The official aspect of the minorities problem, since it involves the question whether and how far the government should hurt men and women, or allow them to be hurt, by reason of their membership in minority groups, must be analyzed in terms of the basic problem of political administration: under what circumstances the government should hurt, or allow to be hurt, *anyone within its jurisdiction*. The term "hurt" is used here, of course, in a broad sense. It is not confined to the infliction of physical pain. It includes every action which compels a person to do what he does not want to do, or prevents his doing what he wishes. Thus people are "hurt" by the imposition of a tax, by the refusal of a job, by being forbidden to drive more than thirty-five miles

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1. See, *e.g.*, *Gibson v. Mississippi*, 162 U. S. 565, 584 (1896), where the defendant alleged that no Negroes had served on grand juries in Washington County, Mississippi, for years, despite the fact that Negroes qualified for such service outnumbered the whites by 7,000 to 1,500.

an hour, by being expelled from the public schools, by being drafted into or excluded from the Army. Virtually every official action somehow restricts the activities or reduces the wealth of those on whom it operates, and thus "hurts" them.

In order to counter a natural initial tendency to disobey, certain techniques are employed by the community and by the government acting on its behalf. Two main techniques have been found useful in meeting this central necessity of inducing obedience to the law. One is to penalize intransigence so severely that potential lawbreakers are deterred by fear. The other is to foster in them a sense of "political obligation," with a view to obtaining their uncoerced obedience and support.<sup>2</sup> In a country where the technique of coercion is mainly relied on, the question, "Why do you obey the law?" would probably bring the simple answer, "Because I shall be punished if I don't." Where the dominant technique is that of political obligation, the usual answer would be less clear-cut: "I obey the law because it is the law; it is right to obey the law. I am afraid of punishment, but more importantly I fear social disapproval and a personal sense of guilt."

The technique of coercion is appealingly simple, and does not depend for its effectiveness on the education or political awareness of either the majority or the minority. Even a primitive savage knows how to inspire fear, and even a dog will avoid pain. The technique of political obligation, on the other hand, is not so universally understood; and it may be well to outline its salient features.

As already stated, the attempt to win uncoerced obedience must reckon with an initial recalcitrance on the part of those who are hurt. This anarchic urge can usually be overcome by inculcation of the concept of community need; "Wouldn't it be terrible if everyone should behave as you have?" is a question propounded to the erring child, to the negligent defendant, to the unrepentant criminal. The serious trouble arises from the fact that in many cases a plausible negative answer can be made. Human lawmaking agencies being fallible, there are inevitably many laws which are "unwise," in the sense that they do not advance the common good to as great an extent as some other feasible course of official action (or inaction), and which forbid socially harmless conduct. Moreover, in any complicated society it is too much to expect that everyone—or, indeed, anyone—can be made to understand the reasons of policy which underlie each of the laws to which he is subject.

The people must therefore be given a reason for obeying even unwise or apparently unwise laws. There was a time, as Ferrero has pointed out,<sup>3</sup> when this need could be satisfied by the general acceptance of a

2. A recent exposition of this idea is to be found in Guglielmo Ferrero's posthumous work, *THE PRINCIPLES OF POWER* (published September, 1942).

3. *Id.* at c. XI, and at 291.

hereditary sovereign ruling by divine right. The Western world, however, has now advanced beyond the point where such a justification of power can be widely accepted; and the only available substitute is a faith that the government is doing its best to accommodate the needs and desires of the whole community. Given that faith, the people can be induced to obey even laws which are, or seem to be, unwise. For if the lawmaking agency is organized to serve the whole community, and if it is honestly striving to do so, the people find it more practical to obey than to resist or disregard its laws—which, if really unwise, can be fairly assumed to be temporary.<sup>4</sup> The price of obedience by the people at the enforcement level is obedience by the government at the legislative level. The key to the problem, then, is (1) a workable governmental mechanism through which everyone of whom obedience is desired—that is, everyone in the community—can effectively demand attention to his needs and desires, plus (2) a known disposition on the part of the lawmakers to seek a fair compromise between competing interests. These are the fundamental conditions of what may be called “just” legislation, legislation *for the purpose* of serving the whole community.

A general recognition that there is a difference between unwise and unjust laws is basic to the whole technique of political obligation. The difference is roughly comparable to that between an erroneous judicial determination and a decision rendered without a fair hearing; it is a commonplace that a losing party will more deeply resent even a correct decision rendered in an unfair trial, than an erroneous decision rendered in a fair one. In the same way, history has shown that people will show a greater measure of respect for laws which are regarded as merely unwise, than for laws thought to be also unjust.<sup>5</sup> As a practical matter, the difficulty of inducing voluntary obedience to laws which are unwise or based on policies imperfectly understood can be overcome only by the creation of a general confidence that the laws are just.

It is true, of course, that this confidence can be most effectively inspired not by analytical explanations of the type here attempted, but by the teachings of Church and school, and by the less articulate but more deeply instilled precept of parental example. The people may not understand the reasons for their sense of political obligation. But this does not mean that the objective can be accomplished through the require-

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4. “Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But . . .” THE DECLARATION OF INDEPENDENCE.

5. For simplicity of statement, the emphasis herein is placed on the people's attitude toward *laws*. But the same observations apply to their attitude toward the officials who enforce the laws.

ment of outward manifestations of assent. Parents and school teachers and religious ministers, as long as they retain the power to mold the thoughts of the people, and particularly of the young people, must hold the genuine belief that the laws are just.<sup>6</sup> Otherwise they will simply fail to inculcate the sense of political obligation, and the government will of necessity be forced to rely upon the technique of coercion.<sup>7</sup>

Both techniques have their advantages. The technique of coercion is easy to apply, speedy in results, and does not depend for its effectiveness on the people's possession of enough political awareness to enable them to make the distinction between laws which hurt them because unwise and hurtful laws unjustly enacted. The technique of political obligation, on the other hand, requires a less cumbersome enforcement mechanism; is less likely to eventuate in violent protest or revolution; and allows greater scope for the development of the individual personality. It is a strong preference for the obtaining of voluntary obedience which is the essential characteristic of what we call a "free government."

In recent years the United States Supreme Court has broadened its jurisdiction to include cases touching upon this great problem of establishing the basic relationships between the rulers and the ruled. These cases, sometimes vaguely termed "civil liberties" cases, have come to be recognized as comprising a distinct field of law. As will appear in the following pages, the Court has declared this nation to be committed to the technique of political obligation in preference to the technique of coercion. It has suggested, further, that the sense of political obligation — based on a confidence that the laws are just — is to be created by the establishment of a community partnership in the running of the government. It seems to have adopted the theory outlined above, that if every person has an equal opportunity to take part in controlling the government which in turn controls him, there will be a general confidence that the laws are designed to serve the needs of the entire community, by making a fair adjustment between the conflicting interests of groups within the community and advancing as far as possible the welfare of the community as a whole.

The existence of minorities creates special problems in the application of these principles. Members of minority groups are, by hypothesis, subjected to widespread suspicion and dislike. Finding themselves *prima facie* ineligible to public office, they tend to doubt that a government from which they are largely excluded is properly responsive to their

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6. The importance of the power to influence the education of children is illuminatingly discussed in the two opinions in the Flag Salute Case [Minersville School Dist. v. Gobitis, 310 U. S. 586 (1940)].

7. Richard Wright's novel, *NATIVE SON* (1940), presents a powerful description of the problems created by failure to inculcate the sense of political obligation. The Ku Klux Klan was undoubtedly organized to cope with such a failure.

needs. If they are subjected to official discrimination, the doubt becomes certainty. This creates an important problem in a country where the population is composed almost entirely of more or less recent immigrants from every land on the face of the earth, and includes a number of very substantial racial, religious, and national minorities. Unless the effects of anti-minority bias are held in check until the bias can wear itself out, there is a real possibility that the general confidence in the just enactment of the laws will be greatly weakened; that the sense of political obligation will be impaired in large segments of our society; that the government will be forced to fall back on the method of brute force; and that, to the extent that this occurs, we shall have ceased to be a "free country."

The following pages trace briefly the steps by which the Court assumed jurisdiction to protect the mechanics of self-government; hypothesize the reasons why, after a century and a quarter, the Court's interest in this matter was finally aroused in the years following the War of 1914-1918; and consider the doctrinal development in recent cases dealing with minority rights, in the light of the underlying policies suggested by the decisions which confirm the constitutional protection of political activity. As the broad structure of the Court's philosophy on the subjects of self-government and minority rights comes into perspective, it will appear that the two matters are related aspects of a single problem—the creation and preservation of a general sense of political obligation.

#### THE POLITICAL ACTIVITY CASES

The recent opinions of the Supreme Court on the constitutional immunities of speech, press, assembly, and the other activities which collectively comprise the mechanism of choosing governmental officials and controlling governmental policies, create the false impression that they do no more than expound ancient doctrine. It is true that the Federal Bill of Rights, ratified almost as early as the Constitution itself, made specific reference to these activities. But in the last twenty-five years their constitutional status has undergone a radical change.

The reason for the change has been a shift in the Court's interpretation of the purpose for which these guaranties exist. The few early opinions which touched upon the rights of comment upon and agitation about public affairs contained no suggestion of an affirmative public interest in the exercise of these rights. Their constitutional scope was analyzed in terms of their importance to the individual rather than their value to the community as a whole.<sup>8</sup> A striking contrast is ap-

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8. For example, in *Davis v. Massachusetts*, 167 U. S. 43 (1897), there was held to be no constitutional right to make public speeches in municipal parks. The Court's reasoning was in terms of the city's right, as a property owner, to regulate the use of its

parent in the recent decisions. The Court now holds (1) that there is a *public* interest in freedom of political activity, over and above the individual interest in freedom to speak, publish and organize; (2) that this public interest is a *national* interest which calls for Federal protection; and (3) that the Court itself is an appropriate Federal agency to administer this national interest.

The first beginnings of a shift of emphasis from protection of an individual "liberty of the subject" to vindication of a public right essential to the good administration of government are found in the great dissenting opinions of Justices Holmes and Brandeis in cases<sup>9</sup> arising under the sedition provisions of the Federal Espionage Act of 1917.<sup>10</sup> In the *Abrams* case, Mr. Justice Holmes declared it to be "the theory of our Constitution" that "the ultimate good desired is better reached by free trade in ideas."<sup>11</sup> In the *Schaefer* case, Mr. Justice Brandeis expressed alarm at the tendency of the Espionage Act, as applied, to "discourage criticism of the policies of the Government."<sup>12</sup> And the same Justice, in the *Pierce* case, warned against impairment of the "fundamental right of free men to strive for better conditions through new legislation and new institutions."<sup>13</sup>

This new approach contained the seeds of a dynamic development which was soon to follow. So long as freedom of expression and organization had been viewed as the natural rights of individuals, they had weighed but lightly against a claim of interference with a definite and well understood collective interest, such as the waging of war.<sup>14</sup>

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own land. And in *Patterson v. Colorado*, 205 U. S. 454 (1907), the Court held that a citation for contempt based on the defendant's criticism of a decision of a State court did not even raise a substantial Federal question. Doubt was expressed as to whether the Fourteenth Amendment embodies any guaranty of free speech and press.

The extent of the Court's subsequent change of attitude can be partially gauged by comparison of the above rulings, respectively, with *Hague v. C.I.O.*, 307 U. S. 496 (1939), and *Bridges v. California*, 314 U. S. 252 (1941).

9. *Abrams v. United States*, 250 U. S. 616 (1919); *Schaefer v. United States*, 251 U. S. 466 (1920); *Pierce v. United States*, 252 U. S. 239 (1920); *cf. Schenck v. United States*, 249 U. S. 47 (1919); *Frohwerk v. United States*, 249 U. S. 204 (1919); *Debs v. United States*, 249 U. S. 211 (1919).

10. 40 STAT. 219 (1917), 50 U. S. C. § 33 (1940).

11. *Abrams v. United States*, 250 U. S. 616, 630 (1919) (Mr. Justice Holmes, dissenting).

12. *Schaefer v. United States*, 251 U. S. 466, 494 (1920) (Mr. Justice Brandeis, dissenting).

13. *Pierce v. United States*, 252 U. S. 239, 273 (1920) (Mr. Justice Brandeis, dissenting).

14. Not a single case has been found in which the Supreme Court, prior to the War of 1914-1918, held unconstitutional a legislative or executive interference with speech, press or assembly. Until the public interest in free expression was articulated, the Court had evinced serious doubt whether the Fourteenth Amendment includes the protection of speech and publication guaranteed against Federal interference by the First. *Patter-*

But when free discussion was perceived to be vital to the general welfare, the balance became more equal. The perception of a public interest in political activity, rather than a belief in the superiority of individual freedom over collective necessity, seems to have accounted for the insistence by Justices Holmes and Brandeis that discussion should be curtailed only on a showing of a "clear and present danger" that it would interfere with legitimate governmental objectives.<sup>15</sup>

In the decade which elapsed before the Court itself adopted the new approach, the dissenters found occasion to discuss the extent to which this public interest is a matter of Federal concern. Granted the existence of a public interest in unhampered discussion and organization, there were at least three possible views as to the extent to which the Court, a Federal agency, should participate in its protection. First, the Court could protect political activity from Federal interference only. The Federal Bill of Rights, which had long since been held not to restrict the action of the States,<sup>16</sup> might easily have been held to be the sole fountainhead of constitutional protection. Second, the Court could also protect discussion of Federal affairs from State interference. The privileges or immunities clause of the Fourteenth Amendment stood ready to hand as a technical basis for such a rule.<sup>17</sup> Third, the Court could protect discussion of local as well as Federal affairs from both Federal and State interference. The privileges or immunities clause, at least as

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son v. Colorado, 205 U. S. 454, 462 (1907). The reasoning in *Hurtado v. California*, 110 U. S. 516 (1884), would have called for a negative answer. As late as 1922 the Court said, by way of dictum: ". . . neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' . . . ." *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 543 (1922). This dictum was repudiated three years later by the whole Court in *Gillow v. New York*, 268 U. S. 652, 666 (1925); but the *Gillow* majority opinion—though later repeatedly cited for the point that due process does include the right of free expression—was at best ambiguous on that point. All Mr. Justice Sanford said was: "For present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment . . . ." 268 U. S. at 666. The same assumption was made in *Gilbert v. Minnesota*, 254 U. S. 325, 332 (1920). The question was finally laid to rest, silently, in *Fiske v. Kansas*, 274 U. S. 380 (1927).

15. *Abrams v. United States*, 250 U. S. 616, 630 (1919); *Schaefer v. United States*, 251 U. S. 466, 493-495 (1920); *Pierce v. United States*, 252 U. S. 239, 269, 273 (1920); *Gilbert v. Minnesota*, 254 U. S. 325, 336-338 (1920); *Whitney v. California*, 274 U. S. 357, 375-378 (1927).

16. *Barron v. Baltimore*, 7 Pet. 243 (U. S. 1833). At one time the Court even maintained that, under the rule against redundancy, the inclusion of specific guaranties in the Bill of Rights *prevented* their protection by the more general due process requirement, which is applicable to both State and Federal governments. *Hurtado v. California*, 110 U. S. 516 (1884). This position was abandoned in *Chicago, B. & Q. R. R. v. Chicago*, 166 U. S. 226 (1897) (right to compensation for property taken by eminent domain).

17. See, e.g., *The Slaughter-House Cases*, 16 Wall. 36, 79 (U. S. 1872); *United States v. Cruikshank*, 92 U. S. 542, 552 (1875).



construed until 1936, would have been too narrow a basis for such a rule; it had been held to apply only to the relationship between United States citizens and the Federal Government.<sup>18</sup> Thus, the technical foundation for at least a part of this broad protection had to be found in the due process clause of the Fourteenth Amendment.

In the Espionage Act cases, which involved Federal prosecutions, the Holmes and Brandeis dissents rested upon the First Amendment; there was no occasion to discuss the Fourteenth. Shortly afterward, however, *Gilbert v. Minnesota* (1920) brought up for judicial review a State statute restricting discussion of a matter cognizable by the Federal Government.<sup>19</sup> Mr. Justice Brandeis, dissenting from a decision upholding the statute, advanced the theory that discussion of Federal matters is not only the right but the duty of United States citizens, and therefore privileged and immune from State interference.<sup>20</sup>

Five years later *Gitlow v. New York* (1925) presented for decision the validity of a State criminal syndicalism statute as applied to penalize publication of the so-called Left Wing Manifesto.<sup>21</sup> The Manifesto was

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18. The Slaughter-House Cases, 16 Wall. 36 (U. S. 1872). This stricture was eased in *Colgate v. Harvey*, 296 U. S. 404 (1935), which held a State tax to abridge the privileges or immunities of Federal citizenship because it tended to discourage investments outside the State. The *Colgate* case was overruled on the privileges or immunities point in *Madden v. Kentucky*, 309 U. S. 83 (1940), but in an opinion which may leave some scope for operation of the privileges or immunities clause beyond the limits marked by the *Slaughter-House* Cases. This possibility has been nourished by the opinions of Justices Douglas (Justices Black and Murphy concurring) and Jackson in *Edwards v. California*, 314 U. S. 160, 177, 181 (1941). These four Justices argued that the privileges or immunities clause forbade California to exclude United States citizens on the ground of indigence. The majority relied on the commerce clause, reserving the privileges or immunities question.

If it is unnecessary to show State interference with the relationship between a United States citizen and the national government, United States citizenship might be held to subsume the right to participate in local government.

19. 254 U. S. 325 (obstruction of enlistment).

20. ". . . The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the Government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. Were this not so 'the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the national government' would be a right totally without substance. See *United States v. Cruikshank*, 92 U. S. 542, 552; *Slaughter-House Cases*, 16 Wall. 36, 79. Full and free exercise of this right by the citizen is ordinarily also his duty; for *its exercise is more important to the Nation than it is to himself*. Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies ordinarily the greatest peril." *Id.* at 337-338 (emphasis added).

21. 268 U. S. 652.

asserted to encourage a revolutionary labor movement. Labor disputes were then regarded as a local problem, so that the "Federal function" theory of the *Gilbert* dissent was not easily available. Accordingly, the dissenters contended for the broadest of the three theories—that all peaceful political activity is protected by the due process clause of the Fourteenth Amendment. And in *Whitney v. California* (1927) Mr. Justice Brandeis brought to full fruition the philosophy which underlay this broad position.<sup>22</sup> He reasoned that the founding fathers believed in the technique of political obligation rather than the technique of coercion as a preferred method of government, and that this preference was perpetuated by constitutional command.<sup>23</sup>

Three technical theories, each implying a different degree of Federal control, were thus available for use if and when the Court should perceive a judicially cognizable national interest in the freedom to discuss public affairs. When such recognition did come, the Court adopted the broadest of the three theories. It rested decision on the due process clause of the Fourteenth Amendment, and held that the right to discuss public affairs (a) exists regardless of the Federal nature of the subject discussed, and (b) is constitutionally protected against both State and Federal interference. *Fiske v. Kansas* (1927), decided the same day as the *Whitney* case, upset a conviction under a State criminal syndicalism statute because it infringed "the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment."<sup>24</sup> And four years thereafter, in *Stromberg v. California* and *Near v. Minnesota*, the Court made it amply plain that the reason for protecting "the liberty of the defendant" was the existence of a public interest in free discussion.<sup>25</sup>

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22. 274 U. S. 357.

23. "Those who won our independence . . . recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." 274 U. S. at 375 (emphasis added).

24. 274 U. S. 380, 387.

25. In the *Stromberg* case, 283 U. S. 359, 369 (1931), which held invalid a California statute penalizing the display of a "red flag . . . as a sign . . . of opposition to organized government," the newly appointed Chief Justice Hughes held:

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

And in *Near v. Minnesota*, 283 U. S. 697, 719-720 (1931), upsetting a State newspaper ban, decision was squarely rested upon the public interest in free public discussion:

"While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a

The Fourteenth Amendment due process clause having been held to protect political activity, it remained for the Court to decide the extent of its own responsibility for enforcement of the constitutional guaranties. It has decided to assume much more responsibility in the field of political rights than in the field of business law.<sup>26</sup> Where a commercial tax or regulation is assailed under the due process clause, the Court now turns a deaf ear if there is any evidence, either in the record or judicially noticed, which if true might lead reasonable men to believe in the need for the questioned legislation.<sup>27</sup> But where official action interferes with political activity, the Court explicitly disclaims any initial disposition to hold either that the legislature is really seeking its avowed objective<sup>28</sup> or that the means employed are appropriate.<sup>29</sup>

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baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities."

26. For a sparkling discussion, see Hamilton and Braden, *The Special Competence of the Supreme Court* (1941) 50 YALE L. J. 1319, 1349-1357.

27. See *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U. S. 177, 190-191 (1938), and cases cited.

28. See, e.g., *Grosjean v. American Press Co.*, 297 U. S. 233 (1936). Louisiana imposed a tax on the gross advertising receipts of newspapers having a circulation of more than 20,000. On the face of the statute, the purpose was revenue. Occupation taxes on particular businesses are not uncommon and are generally upheld; gross receipts levies, though widely criticized as unfair, are of undoubted constitutionality at least so far as the Fourteenth Amendment is concerned; and it is not patently unreasonable to exempt businesses with small receipts on the ground that the cost of collection may exceed the revenue. But the Court, recalling the long history of stamp and advertising taxes as means of suppression of political discussion, and referring to freedom of the press as a fundamentally important means of preventing misgovernment, held that the tax statute violated the due process clause. Counsel had pointed out that twelve of the thirteen newspapers affected were anti-Huey Long newspapers. See 297 U. S. at 238.

29. For example, in *Schneider v. State*, 308 U. S. 147 (1939), the Court held invalid municipal ordinances which had been applied to forbid distribution on the public streets of handbills discussing, among other things, the Spanish Civil War and administration of unemployment insurance. It was urged in support of the ordinances that they were means of accomplishing the permissible purpose of keeping the streets clean. The Court replied (308 U. S. at 161):

"Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to ap-

Having assumed responsibility for protection of the corrective political processes, the Court has evolved a consistent pattern of decisions which gives specific form to the Delphian provisions of the First and Fourteenth Amendments. First, as the Espionage Act cases<sup>30</sup> show, it is axiomatic that there should be no toleration of opposition having a real tendency to aid an external enemy; for defeat in war would endanger the whole structure of the state.<sup>31</sup> Moreover, a main purpose of the allowance of peaceful opposition being to prevent attempts at *violent* change, the permission to oppose cannot be so broad as to include toleration of violent opposition. The principle has been confirmed by the Supreme Court in the cases upholding the State criminal syndicalism statutes, when applied to forbid advocacy of the violent overthrow of government.<sup>32</sup> No member of the Court has ever questioned either of these propositions.

It is a necessary corollary, however, that political activity should not be interfered with *unless* it seeks to by-pass, or threatens the existence of, the regular corrective processes. One main purpose of recognizing the right of political opposition is to avoid violence by creating and preserving the possibility of peaceful change.<sup>33</sup> The duty thus devolves upon

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praise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

In *Hague v. C.I.O.*, 307 U. S. 496 (1939), a city ordinance which restricted public assembly in the streets and parks of Jersey City was sought to be justified by a showing that because of the hostile temper of the community the meetings would create a danger of breach of the peace. A similar argument had prevailed in *Gilbert v. Minnesota*, 254 U. S. 325, 331-332 (1920). But the Court, now more alive to its position as arbiter of the rules of the political game, held to the contrary. Compare *Thornhill v. Alabama*, 310 U. S. 88, 106 (1940); *Cantwell v. Connecticut*, 310 U. S. 296, 307 *et seq.* (1940).

30. Collected in note 9 *supra*.

31. Compare *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 419 (1918); *Minersville School Dist. v. Gobitis*, 310 U. S. 586, 596 (1940).

32. See pp. 9-10 *supra*.

33. The 1842 insurrection in Rhode Island, as described in *Luther v. Borden*, 7 How. 1 (U. S. 1849), provides a perfect illustration. The Rhode Island Charter of 1663 established a freehold qualification for voting. As the State turned from agriculture to commerce and manufacturing, this requirement denied the franchise to many "adult males of personal worth and possessed of intelligence and wealth, though not of land, and . . . made the ancient apportionment of the number of representatives, founded on real estate, very disproportionate . . ." (Mr. Justice Woodbury, dissenting, at 48). A constitutional convention was convened and a constitution drafted by it was submitted for ratification through universal male suffrage, all without the consent of the established government. Officials chosen under this constitution attempted a military coup but abandoned the attempt when President Tyler declared in favor of the incumbent regime, promising military aid if necessary. The Supreme Court held that the question whether the irregular government was entitled to recognition was a political question, and refused to consider it. Mr. Justice Woodbury, though concurring in this holding, expressly recognized the rightness of revolution where the corrective political processes are futile. See 7 How. at 54-55.

the political branches of the government in the first instance, and upon the courts ultimately, to decide whether there is sufficient danger of either to justify particular interferences with political activity; and in deciding this question in particular cases the Court cannot "play safe." Whether it errs on the side of repression or on the side of toleration, it hurts the cause of regular and peaceful adjustment of official policies to the needs of the people.

Within these limits, the evolution of a corpus of specific rules is far on its way. For example: a public address, innocuous in itself, cannot be punished by reason of being delivered under the auspices of an organization which advocates forbidden objectives.<sup>34</sup> Dissemination of ideas in the public streets and parks cannot be made subject to the unguided discretion of municipal officials,<sup>35</sup> or forbidden in order to prevent the littering of the streets,<sup>36</sup> or even to forestall breaches of the peace.<sup>37</sup> Newspapers cannot be suppressed *in futuro* for past misdeeds,<sup>38</sup> and are entitled to special scrutiny of the taxes imposed upon them.<sup>39</sup> The contempt power must not be employed to punish mere criticism of judicial decisions.<sup>40</sup> And so on.

For present purposes, however, it is unnecessary to explore the rules in detail. Enough has been said to demonstrate the existence of a national policy which goes to quite extreme lengths in preserving the right of peaceable criticism, while simultaneously setting a stern face against violent opposition to the government or attempts to hamper it in the waging of foreign wars.

#### UNDERLYING CAUSES: A HYPOTHESIS

In order to understand the bearing of the political activity cases upon the Court's treatment of the minorities problem, it is necessary to ask and answer the questions *why* the Court, after more than a century of indifference, finally recognized a public interest in free political activity; *why* this public interest was thought to deserve Federal protection; and *why* the Court has been willing to substitute its judgment for that of the political branches in this field, at the very time that it has shown an increasing deference to their determinations in other types of due process cases. The answers to these three questions will not only bring deeper understanding of the political activity cases, but will set the background for a necessary insight into the recent decisions touching the minorities problem.

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34. *DeJonge v. Oregon*, 299 U. S. 353 (1937).

35. *Lovell v. Griffin*, 303 U. S. 444 (1938).

36. *Schneider v. State*, 308 U. S. 147 (1939).

37. *Hague v. C.I.O.*, 307 U. S. 496 (1939).

38. *Near v. Minnesota*, 283 U. S. 697 (1931).

39. *Grosjean v. American Press Co.*, 297 U. S. 233 (1936).

40. *Bridges v. California*, 314 U. S. 252 (1941).

*The Public Interest*

The answer to the first question is not to be found in the Court's own opinions, but it can perhaps be hypothesized on the basis of the intellectual *milieu* in which the Court has acted and the nature of the result reached.

As already noted, the conscious development of Federal constitutional protection of deliberative government began at about the time of the War of 1914-1918. That war stimulated a good deal of serious thinking as to the differences between our form of government and that of the Central Powers. The fact that a slogan based on a wish to spread "democracy" could be an effective rallying cry, suggests the extent of popular concern with the question. Then came the Russian Revolution, which led to the realization in practice of a new form of government which a great many Americans believed — whether rightly or wrongly is immaterial here — to be very bad indeed. The fear was widely felt that the Russian form of government would spread to this country. The most immediate reaction to this fear was a widespread campaign against "Bolshevism," a campaign which led to some serious excesses, later generally regretted. But after the popular hysteria died down, thoughtful people continued to wonder what there was about the American system of government which made it so essentially different from that which existed in the U.S.S.R. — and that which had existed in Imperial Germany — that Americans had shown themselves ready to fight, and even to persecute, in the effort to retain "the American System."

The outstanding difference was generally thought to lie in the status of the individual under the Soviet Russian or Imperial German Government, as contrasted with his position in this country. It was often said that we have a "free" government. Although the precise meaning of the epithet was not often articulated, it very often came down to this: that our government is committed to reliance upon the sense of political obligation as a means of inducing obedience to the law, whereas the new Russia and the old Germany were believed to have adopted the technique of official coercion as a preferred method of inducing compliance with the demands of the State. To repeat, it is not strictly material whether or not these ideas were in all respects *accurate*. For the purpose of analyzing the national interest which the Court perceived in the protection of dissident political activity, the important fact is that the ideas were *current*.

The result of the general ferment in the public mind was a realization, on the part of the Supreme Court, that the techniques of coercion and of political obligation are competing *inter sese* for the popular favor. As has already been said, both techniques have their advantages, and the outcome of the contest between them is by no means a foregone

conclusion. It is not surprising that the Court entered the lists to champion the integrity of the corrective political processes, whose preservation is a necessary condition precedent to the existence of a general belief in the justice of the laws.

### *The National Interest*

The question whether the central government can properly take cognizance of particular subject matters arises frequently in any state organized on the basis of a dual sovereignty. The controlling general principle, inherent in the theory of Federalism itself, is that the boundaries of the central power are delimited by reference to the existence of a "national interest" in the subject matter at hand. A "national interest" exists if the action or non-action of particular local governments — State, county or city — will have a substantial effect on people in other parts of the country. In a Federal state, the existence of a national interest justifies central control of the subject matter.<sup>41</sup> Conversely, when the effect of a local activity is felt entirely or almost entirely within the area represented by the local government, national control is improper.

The reason why the existence of a national interest justifies national control over the subject matter is not hard to discern. It is a fair assumption that a local lawmaking body will ordinarily handle local problems with a decent respect for the interests of those to be affected — those to whom it is responsible; but when non-local interests are involved, there is a natural temptation to promote the local welfare at the expense of outsiders. Unless the national government takes charge, the outsiders who are adversely affected will either have no recourse (having no control over the government of a State not their own) or will be led to attempt interstate reprisals. In either event there is an inevitable tendency toward disunity — a tendency which was one of the main reasons for the adoption of our Constitution and creation of our Federal Government.

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41. In the ordinary case, a showing of national interest will probably imply the existence of Federal power. But this does not necessarily follow. Despite the recent tendency to view the Constitution as a general mandate to make the Federal system work, rather than as a set of treaty provisions embodying a fixed bargain among the States, some life remains in the specific language of the instrument. For example, the specific prohibitions upon Congressional action contained in Article I, § 9, would doubtless hold up even in the face of a showing of contrary national interest.

Nor does the existence of *Federal* power necessarily imply the existence of *Congressional* power. The Constitution commits certain matters of national interest to determination by the Federal judiciary without empowering Congress to deal with them — such as interstate boundary disputes. Compare Article III, § 2 with Article I, § 8. And the President is entrusted with the power to make treaties, subject to Senatorial approval. Article II, § 2.

This is not unfamiliar doctrine in the field of business regulation.<sup>42</sup> Opinions in cases construing the commerce clause<sup>43</sup> and the intergovernmental tax immunity<sup>44</sup> have expounded it. But it has not been customary for the Court to explain in these terms the Federal constitutional control of State interference with free expression, and other forms of State action to be discussed later. Here, the Court has generally been content to say that the questioned State action affects "fundamental" rights and that "fundamental" rights are protected by the Federal Constitution — without spelling out the criteria of fundamentality.<sup>45</sup> The nature of the national interest in political activity is not explained.

Of course, it is easy enough to perceive a national interest in the preservation of the machinery whereby popular control is exerted upon the Federal government; the entire country would be affected if the Federal government were to abandon the technique of political obligation and adopt in its stead the technique of coercion. But how can the national interest extend to the political machinery of the States?

The answer can be suggested by supposing the consequences of establishing a dictatorship on the European model in one of the States of the Union. Even though the State government confined its activities to the traditional subjects of local legislation, the teachers and parents and religious ministers of the State could not be expected to differentiate nicely between the local and central governments, and retain a sense of political obligation toward the Federal government after the local government had lost their confidence. Or, to take a more probable example: if the Southern Negro is denied the right to participate in the election of State officials, his distrust of "the government" can be expected to run against the Federal as well as the State government.<sup>46</sup>

42. It was first applied in *McCulloch v. Maryland*, 4 Wheat. 316, 435-436 (U. S. 1819).

43. See *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U. S. 177, 184, n. 2 (1938), and cases there cited; compare *DiSanto v. Pennsylvania*, 273 U. S. 34, 43 (1927) (Mr. Justice Stone, dissenting).

44. See *Helvering v. Gerhardt*, 304 U. S. 405, 412, 416 (1938).

45. See, e.g., *Hebert v. Louisiana*, 272 U. S. 312, 316 (1926); *Grosjean v. American Press Co.*, 297 U. S. 233, 243-245 (1936), and cases there cited. Mr. Justice Cardozo's opinion in *Palko v. Connecticut*, 302 U. S. 319 (1937), catalogues the cases; but his explanation that the due process clause of the Fourteenth Amendment protects rights essential to a "scheme of ordered liberty" (302 U. S. at 325 *et seq.*) does little to answer the question why "ordered liberty" has become a ward of the Supreme Court.

But see the exposition of the national interest in free discussion in wartime, in relation to the State sedition acts, in Comment (1942) 51 YALE L. J. 798, 810-815.

46. Since the decline of the Ku Klux Klan and the invalidation of the so-called grandfather voting statutes [*Guinn v. United States*, 238 U. S. 347 (1915); *Lane v. Wilson*, 307 U. S. 268 (1939)], the most effective methods of disfranchising the Southern Negro have been to exclude him from the all-important Democratic primary and to impose a poll tax as a condition of voting.

There are indications that both these methods may soon be forbidden. The practical significance of *Grovey v. Townsend*, 295 U. S. 45 (1935), that racial discrimination in party primaries is not "state action" and therefore is immune to attack under the Four-



Inasmuch as the entire nation has a stake in the success of the policies of the Federal Government, there is a national interest in the preserva-

teenth Amendment, was much impaired, at least so far as Federal primaries are concerned, by the decision in *United States v. Classic*, 313 U. S. 299 (1941). The *Classic* case removed the grave doubt created by *Newberry v. United States*, 256 U. S. 232 (1921), as to the existence of Congressional power to regulate primary elections; the reasoning of the case seems to confirm the power of Congress to punish any act, official or private, calculated to prevent citizens from voting in a party primary.

While some of the poll tax laws have been repealed, they are still in effect in eight elections. Pub. L. No. 712, 77th Cong., 2d Sess. (Sept. 16, 1942). § 2. The Geyer bill (H. R. 1024), which would have abolished the poll tax as a condition of voting by any person in Federal elections, was passed by the House and probably was favored by a majority of the Senators, but was killed at this session by a filibuster. Defending their abuse of the right of unlimited debate, the filibustering Senators argued that the proposed measure would be unconstitutional. Their contention—which they presumably thought to be so nearly incontrovertible as to justify their foreclosing the Senate, the President and the courts from considering the question—was that the bill contemplated an invasion of the right of the several States to prescribe the qualifications of voters (see U. S. CONST. Art. I, § 2, Art. II, § 1, and the Seventeenth Amendment). The contention would appear to be unfounded. The constitutional provisions which leave it to the States to prescribe the qualifications of voters must be read together with Article IV, § 4, which guarantees to each State a "republican form of government." No State can prescribe electoral qualifications the practical effect of which is to interfere substantially with the representative character of its government. If Congress finds as a matter of fact that poll taxes render the State government unresponsive to the general will, it can properly take remedial steps with respect to State as well as Federal elections. The fact that poll taxes have been held constitutional in the absence of Congressional action [*Breedlove v. Suttles*, 302 U. S. 277 (1937)] is without significance for the reason that the "republican form of government" clause is inoperative except as applied by the political branches. *Luther v. Borden*, 7 How. 1 (U. S. 1849), discussed in note 33 *supra*.

An alternative line of argument might be founded on the fifth section of the Fourteenth Amendment, which gives Congress power to implement the guaranties of the Amendment. Arbitrary deprivation of the franchise has been held to violate the equal protection clause [*Nixon v. Herndon*, 273 U. S. 536 (1927)]; and it seems entirely logical to uphold a statute based on a Congressional finding that the poll tax laws not only were enacted for the discriminatory purpose of disfranchising the Negro but have accomplished that purpose. Here again, the fact that the Court has not been able to reach such a conclusion unaided would not seem conclusive. Congress, with its broad facilities for factual investigation, might well be able to ascertain the existence of the same purpose and effect condemned in *Nixon v. Herndon*; it is immaterial that the Court, limited as it is to the record proof and facts judicially noticeable, has not made such a finding. If this view is adopted with respect to the source of the Congressional power, any charge of inconsistency with the original Constitution is answered by the fact that the Fourteenth Amendment is an amendment.

Other lines of argument are available in support of elimination of the poll tax as a condition of Federal voting. The tax can be criticised as a burden on an essential Federal function, or as a stimulus to electoral frauds which Congress can deal with under the theory of the Corrupt Practices Act. For a more complete discussion see Boudin, *Brief in Support of Pepper Bill*, 2 LAWYERS GUILD REVIEW, No. 2, at 11 (1942); Morrison, *The Pepper Bill (S. 1280) to Outlaw the Poll Tax in Federal Elections is Constitutional*, 2 *id.*, No. 5 at 1 (1942). The Pepper bill was the Geyer bill's counterpart in the Senate.

Whatever the technical approach, it should be kept in mind that the national interest in the problem is beyond dispute. Plausible disagreement can arise only on the questions

tion of the fundamentals of self-rule in local as well as in Federal affairs.<sup>47</sup> If any State adopts measures out of line with the national preference for the technique of political obligation over the method of coercion, the nation as a whole is affected.<sup>48</sup>

One special consideration makes the national interest especially plain at this particular time. Our remarkably unanimous support of the present war is based in large degree on the general feeling that we are fighting to preserve the principle of "free" government. The importance of this feeling, which is basic to our morale, can hardly be overestimated. Under such circumstances there is a danger in anything which creates doubts as to whether our own government is essentially different from those against which we are fighting.<sup>49</sup> The assiduity with which foreign propagandists have emphasized the respects in which our government still falls short of our ideal, is itself a proof of the military importance of the matter.

The justification for Federal intervention in the field is therefore clear. There is a national interest not only in preserving a form of

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whether a specific constitutional command excludes it from the national *power*; and, if not, whether *Congress* is authorized to protect this particular national interest. See note 41 *supra*.

Moreover, even if there were no national interest in the satisfactory operation of local political processes, the effect of the poll tax would be a proper subject of Congressional consideration in the allocation of representation in the House. The almost-forgotten Section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State"; but if the Federal or State franchise is denied to adult male United States citizens, "or in any way abridged, except for participation in rebellion, or other crime," the basis of representation shall be proportionately reduced. (Presumably the Nineteenth Amendment eliminates the word "male.") Those States which abridge the right to vote by means of the poll tax would seem to have an unfairly large representation in the House, if representation is based solely upon the relative populations of the several States [see 46 STAT. 26 (1929), as amended, 54 STAT. 162 (1940), 2 U. S. C. § 2a (1940)].

47. Abraham Lincoln said, "I believe this government cannot endure permanently half slave and half free." Address to the Republican State Convention at Springfield, Ill., June 17, 1858.

48. Compare the situation where State action with respect to matters ordinarily of local cognizance, such as game conservation or the inheritance of real property, is displaced by a conflicting treaty. The national interest in fulfillment of international obligations is held to be paramount even in matters not entrusted to plenary Congressional control. See, *e.g.*, *Missouri v. Holland*, 252 U. S. 416 (1920), and cases there cited.

49. Mr. Wendell L. Willkie, addressing The National Association for the Advancement of Colored People on July 19, 1942, said:

" . . . We have practiced within our own boundaries something that amounts to race imperialism. The attitude of the white citizens of this country toward the Negroes has undeniably had some of the unlovely characteristics of an alien imperialism—a smug racial superiority, a willingness to exploit an unprotected people. . . . But that atmosphere is changing. Today it is becoming increasingly apparent to thoughtful Americans that we cannot fight the forces and ideas of imperialism abroad and maintain a form of imperialism at home. . . .

Our very proclamations of what we are fighting for have rendered our iniquities

government in which men can control their own destinies, but in enabling the common man to see its advantages and know its feasibility. It is an interest in quelling doubts as to the practical efficacy of our system to accomplish essential justice. It is an interest in preventing deviations from our national ideal, even in local government, because deviations create such doubts. In short, it is an interest in making a belief in our system a part of the American creed.<sup>50</sup>

### *The Supreme Court As Enforcement Agency*

Of the three questions posited above, the Court has given the most explicit answer to the third: Why should the Court substitute its own judgment for that of the lawmakers in reviewing an official interference with political activity?

Although the Court abandoned the presumption of constitutionality in political activity cases in 1931,<sup>51</sup> it was not until 1938 that it gave

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self-evident. When we talk of freedom and opportunity for all nations the mocking paradoxes in our own society become so clear they can no longer be ignored." N. Y. Times, July 20, 1942, p. 28, cols. 2-3.

50. Acceptance of the above *rationale* of Federal protection of political activity might easily lead to a false negative inference, which deserves a word of discouragement. It might be supposed that the expression of non-political opinion, having no relation to the policy considerations which control the political activity cases, should therefore not be accorded Federal protection. The fallacy is that there may well be relevant national interests other than the interest in preservation of a general feeling of political obligation.

For example, the Court has upset attempts to restrict the propagation of religious faith and the peaceful publicization of the facts of labor disputes. The nature of the national interest involved in the labor cases has been spelled out quite clearly. *Thornhill v. Alabama*, 310 U. S. 88, 102-103 (1940); *A. F. of L. v. Swing*, 312 U. S. 321, 326 (1941). See also the dissent of Mr. Justice Black in *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287, 304 (1941).

The Court's reasoning is that there is a national interest in the solution of labor problems; that the national policy (whether declared by the Court or deduced from Congressional action, is not clear) is to allow not only free ventilation of the facts of labor disputes, but also certain types of group pressure effectuated through organized persuasion short of the threat of violence; and that peaceful picketing is *therefore* protected by the Constitution.

It is not now pertinent to inquire whether the rulings in the labor cases, depending as they do on a national policy which seems to be properly subject to change by Congress, rest on a different footing than the political activity decisions. The latter, since they establish limitations on the political branches themselves, might be considered to rest on constitutional policy, beyond the power of the legislature or executive to alter.

The national interest in freedom of religious teaching is touched upon in *Cantwell v. Connecticut*, 310 U. S. 296, 310 (1940).

51. See Shulman, Comment, *The Supreme Court's Attitude Toward Liberty of Contract and Freedom of Speech* (1931) 41 YALE L. J. 262. The presumption of constitutionality was heavily relied upon in *Gitlow v. New York*, 268 U. S. 652 (1925) and *Whitney v. California*, 274 U. S. 357 (1927). But beginning with *Near v. Minnesota*, 283 U. S. 697 (1931), the Court has consistently disregarded it in dealing with questions of this kind. The four dissenting Justices in the *Near* case argued that reasonable men might well have considered the Minnesota statute to be a reasonable means of sup-

any hint as to the reason. Oddly enough, it came in a run-of-the-mill case upholding the validity of a Federal commercial regulation against a due process objection, *United States v. Carolene Products Co.*<sup>52</sup> Mr. Justice Stone, one of the staunchest supporters of a strong presumption of constitutionality, was the author of the opinion. He declared that, in commercial cases, the presumption will be given its full effect. But in a footnote he sounded this *caveat*:

"It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon*, 273 U. S. 536; *Nixon v. Condon*, 286 U. S. 73; on restraints upon the dissemination of information, see *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 713-714, 718-720, 722; *Grosjean v. American Press Co.*, 297 U. S. 233; *Lovell v. Griffin*, *supra* [303 U. S. 444]; on interferences with political organizations, see *Stromberg v. California*, *supra* [283 U. S. 359], 369; *Fiske v. Kansas*, 274 U. S. 380; *Whitney v. California*, 274 U. S. 357, 373-378; *Herndon v. Lowry*, 301 U. S. 242; and see Holmes, J., in *Gitlow v. New York*, 268 U. S. 652, 673; as to prohibition of peaceable assembly, see *De Jonge v. Oregon*, 299 U. S. 353, 365.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U. S. 510, or national, *Meyer v. Nebraska*, 262 U. S. 390; *Bartels v. Iowa*, 262 U. S. 404; *Farrington v. Tokushige*, 273 U. S. 484, or racial minorities, *Nixon v. Herndon*, *supra*; *Nixon v. Condon*, *supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."<sup>53</sup>

This footnote embodies a frank recognition that the Court feels a special responsibility for the protection of the "political processes," because, unless some non-political agency intervenes, interferences with the corrective mechanism may well perpetuate themselves. The Court thus performs an important part in the maintenance of the basic conditions of just legislation. By preserving the hope that bad laws can and will be changed, the Court preserves the basis for the technique of political obli-

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pressing an admitted evil. The majority opinion ignored rather than answered the argument; and the question how the Court could consistently substitute its own views for those of the State legislature in cases involving political activity, while at least formally disclaiming the right of plenary review over laws regulating business, was left completely unanswered for seven more years.

52. 304 U. S. 144 (1938).

53. *Id.* at 152, n. 4.

gation, minimizing extra-legal opposition to the government by making it unnecessary. The footnote also spells out the relationship between the need for just conditions of lawmaking and the need for a constitutional rule against official action based on the dislike of minorities. Where the regular corrective processes are interfered with, the Court must remove the interference; where the dislike of minorities renders those processes ineffective to accomplish their underlying purpose of holding out a real hope that unwise laws will be changed, the Court itself must step in. And finally, the footnote shows that in carrying out these policies of state, the Court is acting with full consciousness of its role as the maker rather than the mere interpreter of the organic law.

#### THE MINORITIES PROBLEM IN THE SUPREME COURT

The body of decisional law which the Supreme Court, in the last quarter-century, has built for the safe-keeping of the basic conditions of just lawmaking, is founded on a constitutional policy of maintaining a general faith in the rightness of the law by keeping clear the channels of corrective political action. In this way it is possible to obtain uncoerced obedience, in a degree which would be inconceivable under a government not accountable to the governed.

Construction and preservation of the formal corrective mechanism, however, is wholly inadequate to the purpose in hand. The machinery must work, must reconcile the competing demands of the various groups within the population and translate these demands into law. By and large, the machinery has worked well; but, as the *Carolene Products* footnote suggests, the widespread prejudice against certain groups has been a persistent obstacle to its complete effectiveness. And since this is a substantial problem for a nation whose population includes so many and such large minorities, the same reasons which led the Supreme Court to assume the position of guardian of the corrective political processes have also brought about an attack upon the cognate problem of eliminating a major obstacle to their effective operation.

The vindication of the national interest in the equitable operation of our corrective political processes presents problems considerably more difficult than those encountered in preserving the form of the processes themselves. For one thing, political activity is a very small segment in the life of the average man, whereas minorities questions arise throughout the range of human affairs. The universal franchise, for example, stimulates deep-seated emotional prejudice at fewer points than, say, equality in the use of schools and railroad cars. Another weighty consideration is that, except in the case of the Southern Negro, there has been a long tradition of non-interference with political activity. Social discrimination against minorities, on the other hand, has always been common, and the many types of official action based on this social

attitude have come to be widely accepted as inevitable, or even just.<sup>54</sup> Moreover, as a practical matter it is ordinarily not difficult to determine from the face of a statute whether it interferes with political activity. It is harder to determine whether a statute has in fact been motivated by dislike or distrust of a minority group, or, on the other hand, has been designed with an eye single to the public interest, and merely happens to work particular hardship on some minority group.

It is therefore not surprising that the Court has enunciated no comprehensive philosophy toward minorities problems, as specific as that evolved in the political activity cases. The development of doctrine proceeds cautiously, case by case. Yet, as a short reminiscence will show, the last few years have brought an awareness which was lacking before.

Until the last two or three decades the minorities problem was treated largely as a local matter and the several States were given almost a free hand in the choice of methods for dealing with it.<sup>55</sup> The original Constitution embodied very few restrictions upon any sort of State action. The Federal Bill of Rights was soon held to be inapplicable to the States.<sup>56</sup> The guaranty of a "republican form of government," which perhaps would have been the most likely basis for Federal interference, was held inoperative in the absence of Presidential or Congressional action;<sup>57</sup> and the political branches have not often dared to invoke it.<sup>58</sup>

After the slavery issue had helped to precipitate the Civil War and nearly wreck the Union, the national character of that issue was neces-

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54. See, e.g., *Plessy v. Ferguson*, 163 U. S. 537, 551-552 (1896).

55. The equal protection clause of the Fourteenth Amendment was invoked, in a few cases, to correct bald discrimination. See, e.g., *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). But the Court merely *accepted* the constitutional requirement, and applied it as a statute would be applied. There was little or no attempt to use the Fourteenth Amendment creatively as the groundwork of a living national policy against the mistreatment of minorities. But see the dissenting opinions of Mr. Justice Harlan in the Civil Rights Cases, 109 U. S. 3 (1883); *Plessy v. Ferguson*, 163 U. S. 537 (1896); and *Berea College v. Kentucky*, 211 U. S. 45 (1908).

56. *Barron v. Baltimore*, 7 Pet. 243 (U. S. 1833).

57. *Luther v. Borden*, 7 How. 1 (U. S. 1849).

58. In the Reconstruction period the Northern Radicals occasionally justified their program of guaranteeing social equality to the freed Negroes as an attempt to ensure the prerequisites of a republican form of government. See 2 HOCKETT, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1939) 340; and compare Senators Sumner and Henderson, CONG. GLOBE, 38th Cong., 2d Sess. (1865) 1061 *et seq.* But since that time references to the clause have not generally involved questions of minority rights. For example, the Congressional debate on admitting Arizona, with a constitution providing for the initiative, referendum, and recall, included a discussion of whether these provisions were compatible with a republican form of government. See Senator Chamberlain, 47 CONG. REC. 309-319 (1911). President Taft vetoed the joint resolution to admit Arizona and New Mexico to the Union, but made no specific reference to the republican government clause. See H. R. Doc. No. 106, 62d Cong., 1st Sess. (1911).

sarily recognized. The Civil War Amendments abolished slavery, forbade the disfranchisement of Negroes as such, and protected the new freemen from the grosser forms of official discrimination. But even so, there was for a long time no perceptible tendency to view the minorities problem generally — as distinguished from the Negro problem — as a matter of national import, properly within the cognizance of the central government. From the Civil War to the early '80's, the Negro was temporarily regarded as deserving a special protection, while the remnants of the slave system were being cleared away.<sup>59</sup> Then, in the *Civil Rights Cases* (1883), the Court declared that this period of special tutelage had come to an end.<sup>60</sup> Discrimination against Negroes by private persons — railways, innkeepers, theatres, etc. — was held to be merely "social discrimination" not amounting to a badge of slavery, and therefore beyond the reach of the Federal power. The Court failed to discern any national interest in eliminating private discrimination, and even declared that the problem was inherently unresponsive to any official treatment, State or Federal.<sup>61</sup> Cases involving the status of the Negro were treated as raising the special problem, arising from the unique fact of former enslavement, of enabling one particular group, recently lifted from bondage, to overcome its initial handicap and assume its place in the national society. In enforcing the Civil War Amendments, the Court did no more than enable the Negro minority to take its place alongside other minority groups.<sup>62</sup>

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59. There was at first considerable doubt that the Civil War Amendments, since they had been passed for the primary purpose of safeguarding Negro rights, could properly be invoked in cases not touching the slavery question. See the *Slaughter-House Cases*, 16 Wall. 36, 72, 81 (U. S. 1872).

60. 109 U. S. 3.

"When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected." (*Id.* at 25).

61. See *Plessy v. Ferguson*, 163 U. S. 537, 551-552 (1896).

62. *Civil Rights Cases*, 109 U. S. 3, 20-22, 25 (1883).

The vastness of the gulf between slave status and minority status should nevertheless not be overlooked. At this distance it is not easy to envisage the full extent of the human subjugation which this country has known. But the words of Chief Justice Taney, writing for the Court in *Dred Scott v. Sandford*, 19 How. 393, 404-405, 407-408 (U. S. 1857), warn against the easy assumption that the idea of a master race is wholly alien to American tradition:

"[Negroes] are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their

During the period between the *Civil Rights Cases* and the turn of the century, the constitutionality of official race segregation in public schools,<sup>63</sup> common carriers,<sup>64</sup> and family relationships<sup>65</sup> was firmly established. The reasoning was that segregation on its face involves no more discrimination against the one race than against the other, any inequality of actual effect being due to the difference in the social status of the two groups—a difference thought to be beyond the reach of legislation.<sup>66</sup> The Court was either blind to the fact that official barriers to association prevent the operation of social tendencies which might break down the barriers, or regarded this consideration to be one of purely local concern in which the States could make their own choices.

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authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them."

\* \* \*

"It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

"They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion."

\* \* \*

". . . a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. . . ."

63. *Cumming v. Board of Education*, 175 U. S. 528 (1899).

64. *Plessy v. Ferguson*, 163 U. S. 537 (1896); *McCabe v. Atchison, T. & S. F. Ry.*, 235 U. S. 151 (1914). The commerce clause was construed both as forbidding the States to prohibit segregation of interstate passengers [*Hall v. DeCuir*, 95 U. S. 485 (1877)] and as enabling the carriers to segregate such passengers through the power of prescribing "reasonable regulations" [*Chiles v. C. & O. Ry.*, 218 U. S. 71 (1910)]. See also *L., N. O. & T. Ry. v. Mississippi*, 133 U. S. 587 (1890).

65. *Pace v. Alabama*, 106 U. S. 583 (1882).

66. See, e.g., *Pace v. Alabama*, 106 U. S. 583, 585 (1882); *Plessy v. Ferguson*, 163 U. S. 537, 551-552 (1896). Compare the earlier case of *Railroad Co. v. Brown*, 17 Wall. 445, 452-453 (U. S. 1873), decided before the *Civil Rights Cases*, where the Court seems to have viewed the segregation of Negroes as a form of discrimination against them.



Thus the opinions of the Supreme Court in the half-century between the adoption of the Civil War Amendments and our entry into the War of 1914–1918 betray no perception of a national interest in the minorities problem as such.<sup>67</sup>

### *Germinal Growth*

The enlargement of Federal jurisdiction over the minorities problem began at about the same time as the parallel development in the political activity cases. At first, the Court's thinking was in terms of the unjust treatment of individuals; there seems to have been no effort to trace individual injustices to the social attitude toward the minority groups to which the injured individuals belonged, or to give any weight to the fact of minority status.

Thus in 1917, holding invalid a municipal ordinance which forbade Negroes to move in and occupy a residence situated in a city block predominantly populated by whites (and *vice versa*), the Court rested decision on the fact that the ordinance impaired the value of real property by restricting its use.<sup>68</sup> In 1923, holding that a criminal conviction was lacking in due process because the trial court had been intimidated by threat of mob violence, the Court apparently gave no weight to the fact that the defendants were Negroes on trial for the murder of a white man in Arkansas.<sup>69</sup> A few months later, when postwar statutes restricting the teaching of the German or other foreign languages in private schools were ruled unconstitutional, it was on the theory that they invaded the personal right of parents to control the education of their children and of teachers to practice their calling.<sup>70</sup> Similar reason-

67. Awed, perhaps, by the thought that its decision in the *Dred Scott* case may have helped precipitate the Civil War, the Court adopted a policy of self-effacement even in the treatment of the Negro question; and for fifty years after the Civil War virtually every decision interfering with, or upholding Federal interference with, State policy in the treatment of minorities was rested upon Federal statute rather than upon the Court's own interpretation of the Constitution. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), the one case in this period in which the Court relied solely upon the Fourteenth Amendment, involved such a bald denial of equal protection that the Court found it unnecessary to do more than state the facts and refer to the equal protection clause.

68. *Buchanan v. Warley*, 245 U. S. 60 (1917). The narrow holding of the case was that a white vendor should be given specific performance against a Negro purchaser who had set up the ordinance as a ground for dismissal of the action.

69. *Moore v. Dempsey*, 261 U. S. 86 (1923), silently overruling *Frank v. Mangum*, 237 U. S. 309 (1915), which had given virtually conclusive effect to the findings of the State court on the question whether the trial court had in fact been intimidated. Mr. Justice Holmes, whose dissent in *Frank v. Mangum* had included a reference to lynch law, wrote for the Court.

70. *Meyer v. Nebraska*, 262 U. S. 390 (1923); *Bartels v. Iowa*, 262 U. S. 404 (1923). In regard to these two cases Justices Holmes and Sutherland, though agreeing that a special provision against the German language was invalid, thought that a general statute forbidding the teaching of any foreign language in the first eight grades should be upheld.

ing was relied upon in a 1925 decision upsetting a statute which required all students between the ages of eight and sixteen to attend public schools, and thus practically abolished parochial and other private schools.<sup>71</sup>

In each of these cases there was room for more than a slight suspicion that the assailed State action was occasioned, at least in part, by a widespread dislike of minority groups — Negroes, Germans and Catholics. Yet the Court gave no indication that this circumstance had played any part in its considerations.

Although the cases described just above show that an increased sensitivity to the minorities problem had already come, the *Carolene Products* footnote first displayed an undisguised interest in the problem as such, by suggesting the materiality of an inquiry as to whether State action is "directed at particular religious . . . or national . . . or racial minorities." Of course, the footnote itself was not responsible for the broadening of Federal jurisdiction over the problem. But by defining it in terms of the corrective political processes, the footnote may have had a catalytic effect, perhaps aiding in the crystallization of doctrine by focusing the attention of bench and bar on the special reasons for judicial intervention. At any rate, whatever the cause, the opinions delivered since the footnote made its appearance in April, 1938, reveal a new realism and a closer grappling with underlying social conditions.

### *Criminal Safeguards*

For example, there has been a difference in the approach to cases dealing with the fairness of criminal trials. In *Brown v. Mississippi* (1936), the Court had reversed three murder convictions based on confessions obtained through physical torture.<sup>72</sup> There was nothing in the opinion to suggest that it made any difference whatever that the defendants were Negroes, on trial in the deep South for a crime of violence. The right to freedom from official threat of violence was called "fundamental," without any indication as to why it is fundamental *from the viewpoint of the national interest*. The reasoning proceeded in terms of *individual* rights, there being no suggestion that the particular injustice there complained of might be especially deserving of Federal cognizance because race prejudice rendered remote the possibility of corrective action through the local political processes.<sup>73</sup>

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71. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). See also *Farrington v. Tokushige*, 273 U. S. 284 (1927) (regulation of Japanese schools in Hawaii held properly enjoined pending trial).

72. 297 U. S. 278 (1936).

73. See 297 U. S. at 285-287. Indeed, the long quotation from the opinion of the dissenting judges in the State court suggests a certain anxiety to dispel any suspicion of a Yankee crusade.

The approach is markedly different in *Chambers v. Florida* (1940), reversing the murder convictions of four Negro tenant farmers because they were based on involuntary confessions.<sup>74</sup> The Court declared:

" . . . in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment — just as that in the Fifth — has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, *or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny.* . . .

"Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, *courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement.* Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution — of whatever race, creed or persuasion."<sup>75</sup>

In *Norris v. Alabama* (1935), one of the Scottsboro convictions was reversed because of the systematic exclusion of Negroes from the grand and petty jury lists.<sup>76</sup> The Court delivered a "strict law" opinion containing no reference to the bearing of the case on the broader principles of statecraft. But when a similar question came before the Court in *Smith v. Texas* (1940), the approach was not so legalistic:

"For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Consti-

74. 309 U. S. 227 (1940).

75. 309 U. S. at 235-236, 241 (emphasis added). In *Ward v. Texas*, 316 U. S. 547 (1942), the Court upset a conviction based on an involuntary confession obtained without any substantial physical mistreatment. The defendant was a Negro, convicted in Texas for the murder of a white man. See also *Canty v. Alabama*, 309 U. S. 629 (1940); *White v. Texas*, 309 U. S. 631 (1940), both decided *per curiam* on the authority of the *Chambers* case. In the *White* case the State's petition for rehearing was denied with opinion, 310 U. S. 530 (1940). Both these cases involved Negroes in the South.

76. 294 U. S. 587 (1935).

tution and the laws enacted under it *but is at war with our basic concepts of a democratic society and a representative government.*"<sup>77</sup>

An emerging recognition of the minorities problem as a weighty factor in determining the constitutional adequacy of criminal practice is further indicated by the recent decision in *Betts v. Brady*.<sup>78</sup> An indigent white man, indicted for robbery in Maryland, was convicted after the court had refused his request to appoint counsel. He sought release on habeas corpus, claiming a violation of the due process clause under the rule of *Powell v. Alabama*.<sup>79</sup> His contention was rejected.

The majority opinion, by Mr. Justice Roberts, gives no very satisfactory explanation of the distinction between the two cases. The fact that the *Powell* case involved a capital offense is mentioned; but in view of the fact that *Betts* had received an eight year sentence, it seems doubtful that a constitutional difference can be found in the severity of the respective punishments. The opinion also suggests that the statutes of Alabama required appointment of counsel for defendants in rape cases, whereas the Maryland statutes gave no such right to alleged robbers;<sup>80</sup> but surely the Court does not mean to explain the *Powell* decision as a ruling that the highest Alabama court had misinterpreted the Alabama statutes.

The Court's affirmative reasons for its decision are hardly more satisfying than its treatment of the judicial precedents. The diversity of State legislation on appointment of counsel is adduced in aid of the proposition that the right to appointment is a matter of local legislative policy rather than a "fundamental" element of criminal justice. But the dissenting opinion of Mr. Justice Black, in which Justices Douglas and Murphy also joined, presents a fairly effective counter-analysis, showing that only Maryland and Texas have affirmatively sustained a refusal to appoint counsel in serious criminal cases.

The decision can be most satisfactorily explained as a muffled and possibly unconscious ruling against Federal intervention in the absence of a showing that the case involves some national interest, such as that in the minorities problem. In the circumstances of this case, refusal to appoint counsel might be thought to create no great probability of any error which the State courts could not be relied upon to correct.<sup>81</sup> *Betts*

77. 311 U. S. 128, 130 (1940) (emphasis added).

78. 316 U. S. 455 (1942).

79. 287 U. S. 45 (1932).

80. Mr. Justice Roberts makes similar observations as to *Avery v. Alabama*, 308 U. S. 444 (1940), and *Smith v. O'Grady*, 312 U. S. 329 (1941).

81. The Court declares: "It is quite clear that *in Maryland*, if . . . it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction" (emphasis added). 316 U. S. at 472-473. The dissenting Justices did not deny the propriety of a case-to-case approach; their opinion begins: "To hold that

was not shown to be a member of any minority group, whereas, as the Court took pains to note, the *Powell* case (one of the Scottsboro cases) involved "ignorant and friendless negro youths."<sup>82</sup> And although there

the petitioner had a constitutional right to counsel in this case does not require us to say that 'no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.' This case can be determined by resolution of a narrower question: whether in view of the nature of the offense and the circumstances of his trial and conviction, this petitioner was denied the procedural protection which is his right under the Federal Constitution." 316 U. S. at 474.

The *Betts* decision, turning as it does on the absence of any minorities question in the particular case, reflects an unusual degree of judicial sensitivity. There is some indication, however, that the same consideration has been an operative factor in determining the types of State criminal procedure cases in which the Court should intervene. As noted above, p. 16, the Court has said it will intervene where "fundamental" rights are violated. But an inarticulate recognition of the national interest in the preservation and effective operation of the corrective political processes may underlie this apparently subjective approach to the question whether particular rights secured against Federal infringement by the first eight Amendments are also protected against State action by the Fourteenth. In general, the rights which are protected from State as well as Federal action are those which are peculiarly important to the expression of political opposition or to the vindication of minority rights. For example: freedom of speech [*Stromberg v. California*, 283 U. S. 359 (1931)]; freedom of the press [*Near v. Minnesota*, 283 U. S. 697 (1931)]; freedom of religion [see *Minersville School Dist. v. Gobitis*, 310 U. S. 586 (1940)]; freedom of assembly [*DeJonge v. Oregon*, 299 U. S. 353 (1937)]; right to counsel (cf. the *Powell* and *Betts* cases, discussed above); freedom from official intimidation [*Brown v. Mississippi*, 297 U. S. 278 (1936)]; right against use of knowingly perjured testimony [*Mooney v. Holohan*, 294 U. S. 103 (1935)]; right to a trial free of mob domination [*Moore v. Dempsey*, 261 U. S. 86 (1923)]. [But compare *Chicago, B. & Q. R. R. v. Chicago*, 166 U. S. 226 (1897), which held that the Fourteenth Amendment requires just compensation for property taken by eminent domain].

On the other hand, those rights which seem not to be connected with political activity or minority rights have in most cases been denied protection against State action. For example: right to indictment for infamous crime [*Hurtado v. California*, 110 U. S. 516 (1884)]; right against self-incrimination [*Twining v. New Jersey*, 211 U. S. 78 (1903)]; right to a common law jury of twelve in criminal cases [*Maxwell v. Dow*, 176 U. S. 581 (1900)]; right to jury trial in certain civil cases at common law [*Walker v. Sauvinet*, 92 U. S. 90 (1875)]; right to be confronted by witnesses [*West v. Louisiana*, 194 U. S. 258 (1904)]; right against double jeopardy [*Palko v. Connecticut*, 302 U. S. 319 (1937)].

82. 316 U. S. at 463. Compare *Lisenba v. California*, 314 U. S. 219, 239-240 (1941), where the Court, rejecting the white defendant's claim that he had been coerced into confessing murder, distinguished earlier cases as follows:

"We have not hesitated to set aside convictions based in whole, or in substantial part, upon confessions extorted in graver circumstances. These were secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified; who sensed the adverse sentiment of the community and the danger of mob violence; who had been held incommunicado, without the advice of friends or of counsel; some of whom had been taken by officers at night from the prison into dark and lonely places for questioning. This case is outside the scope of those decisions."

The *Lisenba* case was decided five months before *Ward v. Texas*, 316 U. S. 547 (1942), mentioned in note 75 *supra*, where on strikingly similar facts the conviction of a

is much to commend the view of the dissenting Justices that representation by counsel is essential to a fair trial in any serious case, it must be admitted that there is a special reason for Federal intervention where the minorities problem has impinged upon the State's machinery of criminal justice.<sup>83</sup>

### *The Segregation Cases*

Like the criminal procedure cases, the segregation cases too have recently shown a change in approach. As pointed out above, it was held long ago that the States can constitutionally forbid the white and colored races to intermarry or to mingle in public schools and railway cars.<sup>84</sup> The old segregation cases proceed on the theory that equal separate treatment is constitutionally permissible; but there is good reason to doubt that the treatment was in fact required to be equal. For example, in *Cumming v. Board of Education* (1899), the Court declined to interfere with the closing of the Negro high school in Richmond County, Georgia, for lack of funds, although the white high school — operated under the same Board of Education — remained open.<sup>85</sup> It was urged in vain that, under the rule of equality, the Board of Education was required either to close the white school or divert from it enough funds to keep the colored school open. Moreover, as late as 1927, in the odd case of *Gong Lum v. Rice*, the hollowness of the equality requirement was made amply plain.<sup>86</sup> Martha Lum, a young Chinese girl, objected to her exclusion from the white schools under the Mississippi Constitution which required separate instruction of white and colored children. There were no separate schools available for Chinese students,

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Negro was reversed. Two months before the *Ward* case, *Hysler v. Florida*, 315 U. S. 411 (1942) upheld a conviction based on testimony alleged to have been obtained through the coercion of accomplices. The defendant, as well as the accomplices, seem to have been white men.

83. *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942), is another reflection of the Court's interest in the minorities problem. An Oklahoma statute providing for the sterilization of third offenders was held unconstitutional. Mr. Justice Douglas, speaking for the Court, remarked: "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear." (316 U. S. at 541). Mr. Justice Jackson concurred, declaring: "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority . . . ." (316 U. S. at 546). The case is discussed in Note (1942) 51 YALE L. J. 1380.

84. See p. 24 *supra*. In *Berea College v. Kentucky*, 211 U. S. 45 (1908), a State statute forbidding joint instruction even in private schools was upheld on the narrow ground that the school in question was a Kentucky corporation and the State could impose the limitation through the reserved power of charter amendment.

85. 175 U. S. 528 (1899).

86. 275 U. S. 78 (1927).

and only the Negro school was open to Miss Lum. It was argued on her behalf that the school segregation laws are enacted to preserve racial purity; that the law in question, as administered, protected the purity of the white but not of the black and yellow races; and that the latter therefore suffered inequality of treatment.<sup>87</sup> The argument seems unanswerable; and Chief Justice Taft's opinion upholding the statute does not answer it.<sup>88</sup>

The present Court has not yet given any overt indication that it will revise its views as to the constitutionality of segregation laws. But it has suddenly adopted such a very rigorous interpretation of the requirement of equal treatment that one may well wonder whether it is not trying to make continuance of the segregation policy a too expensive luxury. In *Missouri ex rel. Gaines v. Canada* (1938),<sup>89</sup> a Negro applied for a mandamus to compel his acceptance as a student in the law school of the University of Missouri. Under the State law, only white students could enter the school; but, there being no other State law school in Missouri, the authorities stood ready to pay the tuition of Negroes in the law school of any adjacent state, together with transportation expenses. As the dissenting opinion of Mr. Justice McReynolds pointed out, there was little inequality in fact; the most glaring inequality disclosed by the majority opinion was that law students may find it advantageous to attend school in the state where they intend to practice — indeed a puny showing alongside that made in the *Cumming* and *Gong Lum* cases. Yet Missouri was held to have denied the equal protection of the laws.

*Mitchell v. United States* (1941) applied an equally strict rule to segregation by interstate carriers.<sup>90</sup> This decision was rested not on any constitutional requirement but on an interpretation of the Congressional prohibition of "undue" preferences in service, embodied in the Interstate Commerce Act. Mitchell, a Negro Congressman, on his way from Chicago to Little Rock, Arkansas, was required to leave his Pullman seat when the train crossed the Arkansas line; and, no Pullman drawing rooms being available, he had to ride in a coach. He petitioned the Interstate Commerce Commission to enjoin the alleged discrimination. The Commission denied the petition. Mitchell brought the case before a Federal District Court, which upheld the Commission's order.

In the Supreme Court the Commission and the railroad argued that there was no discrimination because Negroes were given separate drawing rooms, when available, at the price paid by whites for regular seats

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87. See 275 U. S. at 78-79.

88. The Court treated the case as raising only the question whether it is constitutional to segregate the white and yellow races.

89. 305 U. S. 337 (1938).

90. 313 U. S. 80 (1941).

or berths. They also pointed out that ordinarily the drawing rooms are adequate to take care of the very small Negro demand for Pullman accommodations — although, to be sure, they were unavailable to Mitchell because already reserved by whites. But the Court found inequality in the fact that a Negro might have to make Pullman reservations longer in advance than a white man, and in the fact that use of the observation and dining cars was available only to whites.<sup>91</sup>

It is too early to say whether the Court's present hostility towards race segregation foreshadows a modification or abandonment of the old cases holding it constitutional. On principle, however, there is much to be said for the removal of official obstacles to free association. It will not do to argue that the government should not attempt to enforce "social equality"; the only effect of repealing or otherwise eliminating the segregation laws would be to let each individual decide for himself, without interference by the government, who his friends are to be.

### *Unsettled Issues: Flag Salute and Race Hatred*

The opinions in the procedural due process and the equal treatment cases give clear indication that the Court is more ready than before to participate in the prevention of local discrimination against minorities. Other straws in the wind suggest other directions of future development.

The Flag Salute Case, *Minersville School District v. Gobitis* (1940), presented the minorities problem in its most difficult form.<sup>92</sup> A local ordinance required students in the public schools to salute the American Flag each day. The two Gobitis children, Jehovah's Witnesses, refused on the ground that they regarded the salute as an act of obeisance to a graven image, in violation of Biblical Commandment. The children were expelled and sued for reinstatement, attacking the ordinance as

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91. In support of the proposition that the small volume of Negro traffic does not justify an inequality in sleeping-car accommodations, Chief Justice Hughes cited his own dictum in *McCabe v. A. T. & S. F. Ry.*, 235 U. S. 151 (1914), a case arising under the equal protection clause. But he did not bring out the fact that the practical effect of the *McCabe* dictum was much impaired by the holding that equitable relief should be denied because the plaintiffs made no showing that they ever intended to use sleeping-car accommodations. A similar contention was made in the *Mitchell* case, it being pointed out that Mitchell had failed to show any future need for the service. The Court replied:

"Nor is it determinative that it does not appear that appellant intends to make a similar railroad journey. He is an American citizen free to travel, and he is entitled to go by this particular route whenever he chooses to take it and in that event to have facilities for his journey without any discrimination against him which the Interstate Commerce Act forbids." (313 U. S. at 93).

The *McCabe* and *Mitchell* rulings can perhaps be reconciled on narrow grounds, but the change in attitude is unmistakable.

92. 310 U. S. 586 (1940).



an unconstitutional interference with personal liberty in general and religious liberty in particular. The Federal District Court granted injunctive relief as prayed,<sup>93</sup> and the Circuit Court of Appeals affirmed.<sup>94</sup>

The question presented to the Supreme Court was not an easy one. On the one hand, the ordinance in question operated harshly upon the members of an unpopular group by reason of their religious beliefs, and was regarded by them as an unjust law. The sanction was singularly inappropriate; expulsion of the children from public school, far from helping to establish their faith in the justice of the laws, removed them from the very influence which might have done most to strengthen their sense of political obligation and their loyalty to their country. Moreover, the effect of the ordinance was to require the children to abandon one of two important desiderata — public education or divine approval — for the sake of a pedagogical technique which is of doubtful value at best.<sup>95</sup>

On the other hand, the ordinance in question, unlike the segregation laws and the convictions in the *Brown* and *Chambers* cases, could not confidently be attributed to an unfriendly official attitude toward a minority. Avowedly, and it well may be sincerely, it was designed to encourage patriotic feeling. And the case came up at the precise time that the successful German invasion of Norway and the Low Countries was offering stern warning that nowadays unity and loyalty are a national necessity.<sup>96</sup>

Under the impact of these opposing considerations, the Court beat a limited retreat from responsibility, taking refuge for the moment in the presumption of constitutionality. To be sure, the presumption was not reinstated fully; there was no suggestion that state action will, as a general rule, be given the benefit of the doubt in minorities cases. But Mr. Justice Frankfurter declared the narrow issue of substantive policy to be a question of educational technique: whether in fact the flag salute substantially advances the important policy of increasing patriotic feeling. This question he declared to reside within the special competence of the local school boards. To upset their determination unless it was clearly irrational would therefore, he held, "in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it."<sup>97</sup>

Mr. Justice Stone, the lone dissenter, hewed to the line he had marked out in the *Carolene Products* footnote. Pointing out the availability of

93. *Gobitis v. Minersville School Dist.*, 24 F. Supp. 271 (E. D. Pa. 1933); opinion on motion to dismiss, 21 F. Supp. 581 (E. D. Pa. 1937).

94. 108 F. (2d) 683 (C. C. A. 3d, 1939).

95. The Circuit Court of Appeals (per Judge William Clark) stressed its disbelief in the efficacy of the method. See 108 F. (2d) at 691-692.

96. The case was argued April 25, 1940, and decided June 3, 1940.

97. 310 U. S. at 598.

alternative means to the same end, which would not require violation of religious scruples, he argued that the Court should have taken the responsibility of striking down the flag salute law even though it were thought to enhance the feeling of national unity.

" . . . where there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both . . . *it is the function of courts* to determine whether such accommodation is reasonably possible. . . . even if we believe that such compulsions will contribute to national unity, there are other ways to teach loyalty and patriotism which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe and by commanding a form of affirmance which violates his religious convictions. Without recourse to such compulsion the state is free to compel attendance at school and require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country."<sup>98</sup>

The two opinions contain an interesting byplay which has a special bearing on the relationship between the political activity cases and the minorities problem. Mr. Justice Frankfurter approved the first suggestion of the *Carolene Products* footnote, that the courts should be astute to prevent legislative interference with the corrective political processes. But, at least in the absence of purposeful discrimination, he rejected the thought embodied in the last half of the footnote: that perhaps the courts should also be ready to protect minorities whose unpopularity might foreclose them from effective resort to those processes. He argued:

"Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."<sup>99</sup>

To this, Mr. Justice Stone replied:

"I am not persuaded that we should refrain from passing upon the legislative judgment 'as long as the remedial channels of the democratic process remain open and unobstructed.' This seems to

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98. *Id.* at 603-604 (emphasis added).

99. *Id.* at 600.

me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will. We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities. See *United States v. Carolene Products Co.*, 304 U. S. 144, 152, note 4. And until now we have not hesitated similarly to scrutinize legislation restricting the civil liberty of racial and religious minorities although no political process was affected. *Meyer v. Nebraska*, 262 U. S. 390; *Pierce v. Society of Sisters*, *supra*; *Farrington v. Tokushige*, 273 U. S. 284. Here we have such a small minority entertaining in good faith a religious belief, which is such a departure from the usual course of human conduct, that most persons are disposed to regard it with little toleration or concern. In such circumstances careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired belief, is especially needful if civil rights are to receive any protection. Tested by this standard, I am not prepared to say that the right of this small and helpless minority, including children having a strong religious conviction, whether they understand its nature or not, to refrain from an expression obnoxious to their religion, is to be overborne by the interest of the state in maintaining discipline in the schools."<sup>100</sup>

It might be thought that the 8-to-1 vote in the *Gobitis* case was sufficiently decisive to relegate the views of the dissent to the limbo of academic speculation.<sup>101</sup> But there has been a recent indication that the question is not closed. In *Jones v. Opelika*, decided June 8, 1942,<sup>102</sup> Justices Black, Douglas and Murphy went out of their way to repudiate the *Gobitis* decision.<sup>103</sup> Two more of the eight Justices comprising the

100. *Id.* at 605-606.

101. This academic speculation has, however, been continuous and vigorous. See Note (1942) 52 YALE L. J. 168, 175, n. 49 *infra*, collecting the comments on the case in the legal periodicals.

102. 316 U. S. 584. In a 5-to-4 decision, the Court upheld occupational licensing ordinances as applied to the "business" of selling religious literature in the course of itinerant preaching.

103. "The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group. This is but another step in the direction which *Minersville School District v. Gobitis*, 310 U. S. 586, took against the same religious minority and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be." 316 U. S. at 623-624.

*Gobitis* majority, Hughes and McReynolds, have retired. Thus, of the seven present members of the Court who have declared themselves on the point, four now consider the flag salute requirement unconstitutional. Mr. Justice Jackson and the successor of Mr. Justice Byrnes will hold the deciding votes.<sup>104</sup>

The Court has touched lightly on the vexed question whether the right to free expression includes the right to incite hatred of racial and religious groups. Doctrinaire adherence to a belief in the right of free expression as a mystical absolute might lead to the view that the constitutional immunity extends to systematic group defamation, as practiced by such organizations as the German-American Bund. Yet, if the right of expression of opinion is to be protected as the implement of a definite national policy of preserving the technique of political obligation — the mark of "free" government — then the wilful aggravation of social cleavages, which constitute a principal obstacle to the realization of that policy, might be thought not to call for constitutional protection.

*Cantwell v. Connecticut*, although it did not squarely present the problem, did involve a situation sufficiently similar to bring it to the mind

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104. Promptly after the decision in *Jones v. Opelika*, three members of the Jehovah's Witnesses sued to enjoin enforcement of the West Virginia Flag Salute statute. The three-judge Federal District Court *disregarded the Gobitis case as bad law* and granted an injunction. *Barnette v. West Virginia State Board of Education*, S. D. W. Va., Oct. 6, 1942. Judge Parker, writing for the whole Court, declared:

"Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. . . . The developments with respect to the *Gobitis* case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in *Jones v. City of Opelika*, 316 U. S. 584, 62 Sup. Ct. 1231, 1251. The majority of the court in *Jones v. City of Opelika*, moreover, thought it worth while to distinguish the decision in the *Gobitis* case, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of [complainants], we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."

The court rejected an alternative contention of the plaintiffs that the State Flag Salute laws have been displaced by the Act of June 22, 1942, Public Law No. 623, 77th Cong., 2d Sess., which declares: ". . . civilians will always show full respect to the flag when the pledge [of allegiance] is given by merely standing at attention, men removing their headdress . . . ." It may be noted that in the *Gobitis* case the Court pointedly referred to the fact that "Congress has not entered the field of legislation here under consideration." 310 U. S. at 600, n. 7.

of the Court.<sup>105</sup> In that case Jehovah's Witnesses had made verbal attacks on Catholics and other religious groups; but so far as the record showed, the intent was to proselytize rather than to incite hatred. The Court upset a disorderly conduct conviction, but took occasion to remark:

"There are limits to the exercise of these liberties [of free expression]. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish."<sup>106</sup>

There is an anecdote which is told of a dispute between the elder Elihu Root and Alexander Kerensky, when the latter was at the head of the Russian Government.<sup>107</sup> Root, reared in the Anglo-Saxon tradition of free expression, counselled suppression of the Communist Party on the ground that it was actively planning revolution and that the right of political activity exists to prevent rather than to facilitate revolt. Kerensky, born and trained under the autocratic Tsarist regime, refused; he argued that such action would infringe the rights of free speech, press and assembly. The October Revolution settled the argument.

From the *Cantwell* dictum it can be gathered that the Court favors the Root over the Kerensky interpretation of the right of free expression, and will not let the political liberties eat themselves up. The problem is a complicated one, however, and the above quotation is little more than a statement of initial attitude. It makes plain the constitutionality of prohibition upon incitations to violence and breach of the peace.<sup>108</sup> In this country, however, most anti-minority activity has fallen short of a threat of immediate physical attack; and the Court has not indicated how far the political branches will be allowed to go in dealing with the more general phenomenon of group defamation.<sup>109</sup>

A multitude of factors bear upon the constitutionality and wisdom of legal prohibitions upon the incitation of anti-minority feeling. Inquiry must be made as to the temper of the times; in a period of crisis, the temptation to blame public ills on defenseless minorities may make it hard to erase the effect of a calumny once it is published. It is also important who does the inciting; systematic disparagement by an agency

105. 310 U. S. 296 (1940).

106. 310 U. S. at 310.

107. For this anecdote I am indebted to Grenville Clark, Esq., of the New York Bar.

108. See *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942).

109. For a full and authoritative discussion, see Professor David Riesman's recent series in the *Columbia Law Review*: *Democracy and Defamation: Control of Group Libel* (1942) 42 COL. L. REV. 727; *Democracy and Defamation: Fair Game and Fair Comment I* (1942) 42 COL. L. REV. 1085; *id.*, II (1942) 42 COL. L. REV. 1232.

organized for the very purpose of arousing racial, religious or anti-alien feeling is likely to be more insidious and more effective than the attacks of irrational amateurs. Another consideration is the character of the statement; some charges—such as the assertion that Negroes are racially predisposed to crimes of violence or that Jews indulge in ritual murder—are inherently difficult to disprove.

These factual considerations are to be reviewed against the background of the recent experiences in other countries. "Events familiar to all" illuminate the patterns of demagoguery, which contain the seeds of future growth and possible dominance, and point the differences between these dangerous manifestations and the impotent raving of the individual neurotic whose views are discredited at the outset by his own obvious imbalance.

#### TOWARD THE ELIMINATION OF MINORITIES

As the Court has gradually clarified the content of the constitutional restrictions on state action directed against the members of minorities, there has emerged a constantly clearer picture of the governmental technique to which the Court has held us to be committed. As decision follows decision it becomes increasingly plain that an important source of the Court's concern with the so-called "civil liberties" cases is the public interest in the maintenance of certain great principles of statecraft. The aid of the Court can be most readily enlisted, in a case of this kind, by a showing that the questioned state action would contravene the rules which the Court is formulating for the preservation and perfection of popular government.

Until the Court itself speaks more explicitly, there can be no confident enumeration of these principles of government which the Constitution has so recently been found to embody, or of the considerations of public policy which require them. But given the points so far fixed, we can perhaps spell out the more important ones. The main propositions can be stated rather simply.

*First:* The cardinal duty of the government is to preserve civil order, and violent opposition to lawful authority cannot be tolerated.

*Second:* Violent opposition to the government is to be prevented, where possible, not through coercion but through encouragement of voluntary cooperation. Such cooperation can ordinarily be obtained by facilitating the expression of peaceable criticism and by protecting the regular channels for bringing effective pressure to bear upon governmental officials and policies.

*Third:* Since the many minority groups in this country are by definition viewed with an irrational suspicion and disfavor by the majority and therefore cannot so effectively use the regular channels of group

pressure, the need to secure their obedience and support presents a special problem. In order to confirm the faith of minority groups that the laws—however unwise they may be—are just, the government must refrain from taking any action, either by legislation or through its prosecutors and courts, which is or seems to be based on dislike of any minority as a group.

*Fourth:* The most satisfactory long-range solution of the minorities problem is to *eliminate minorities* by doing away with irrational private prejudice against particular groups. To this end, the government should refrain from erecting official barriers to association between majority and minority groups, and at least in some circumstances can properly penalize the incitation of group prejudice on the part of private individuals.

The present international situation renders peculiarly important the general understanding of these principles and of the reasons why the central government can properly insist upon their observance. Any supernational organization created to offer some substitute for war as a means of settling international disputes will face the initial problem of overcoming the centrifugal force of nationalism. National loyalty is naturally exaggerated during and after a war; and if the experience with the League of Nations is not to be repeated, there must be a *government* with full power to exert compulsion upon the people of the several nations in matters which effect any "international interest."<sup>110</sup> To rely entirely on compulsion, however — on the technique of coercion — would only be to substitute one type of war for another. Therefore this limited transfer of sovereignty must be supplemented by the creation of a new loyalty which will evoke uncoerced obedience to the new supernational organization. In short, we must repeat — on a grander scale — the genesis of our own Federal Government.

The minorities problem created by any such venture will be tremendous. Well defined ethnic groups, set apart by differences in language and customs, and in many cases embittered by past injustices, must be induced to participate with their erstwhile enemies in the common task of avoiding war. It will not be easy for the supernational state to win acceptance of its decisions. Only in the most rigorous, self-denying adoption of the technique of political obligation resides the hope of maintaining international peace. In approaching the task of gaining the allegiance and voluntary obedience of the people of the several nations, the leaders may find helpful guides in the principles which have been evolved to meet our own not dissimilar domestic problem.

Even within the United States, however, the problem is still far from final solution. It is true that the tendency of minorities to withhold

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110. Compare the definition of "national interest" at p. 15 *supra*.

from the government their obedience and support has been far less noticeable here than in many European countries and their colonial possessions. Nevertheless, as is perhaps most dramatically demonstrated by the current experience with the Japanese-American minority, we have not been entirely successful; decades of incessant hostility toward this group have so hampered the inculcation of loyalty to our government that even American citizens of Japanese ancestry, men and women born and educated in this country, must be suspected as enemy adherents and removed from the zone of probable military operations.<sup>111</sup> Because of our failure to instill the sense of political obligation in this minority group, the exigencies of war now compel us to establish a menacing exception to the rule that a man should be punished only for his own acts or omissions.

The Japanese-American situation, though perhaps the best example of discrimination come home to roost, is quantitatively insignificant and can therefore be handled by physical segregation, at least for the time being. The experience with the American Indian shows that such treatment, though it prevents rather than aids assimilation and therefore does not strike at the root of the matter, is practicable when the group to be dealt with is small. But the obvious impossibility of enforcing such measures with respect to the larger minority groups in this country, or even with respect to very many of the smaller ones, creates an imperative preference for prevention rather than quarantine.

The minorities problem cannot be permanently solved, here or elsewhere, short of the *elimination* of minorities. In some countries serious efforts are being made to eliminate them by extermination. The future will show whether the horror and resentment aroused by these tactics will in the end cause the rulers more trouble than even the continued existence of intransigent minority groups. In this country, we are adopting a different means to the same end. Our policy is to eliminate minorities, not by exterminating them but by doing away with the irrational prejudices and fears to which they owe their existence. The Supreme Court has assumed jurisdiction over the problem because a national interest is at stake. The Court has taken the lead both in explaining the methods which the political branches must adopt in dealing with minority groups, and in explaining the policies on which that choice of methods is founded.

We may prove to be incapable of the self-restraint and understanding without which this national policy cannot be made to work. But if it can be made to work, the rewards in the increased yield of our human and natural resources and in the permanent elimination of wasteful friction and disunity among the many groups which comprise our population, will be rich beyond measure.

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111. For an illuminating and well-balanced discussion, see Comment, *Alien Enemies and Japanese-Americans: A Problem of Wartime Controls* (1942) 51 YALE L. J. 1316.



## POSTSCRIPT AND PROLOGUE

The Supreme Court is by no means the only source of broadened insight into the minorities problem. The opinions of the Justices have been chosen as the source material for this paper not because they are thought to embody the most trustworthy views on political theory, or manifest the most profound understanding of social conditions, or reflect the most nearly perfect application of political principles to social problems. They have been chosen, rather, because the Court has assumed the responsibility of declaring the policy of the nation with respect to the relationship between the government and the people. Other sources may yield a rich harvest of ideas as to what the national policy *ought to be*, and why; but the Supreme Court is in the process of stating authoritatively what the policy *is*. To study the growth of judicial doctrine in this field is to trace a main current of national thought.

Since doctrinal growth is a historical process, the mere restatement of our organic policy at the present stage of its development can do no more than describe a direction. But this is a necessary job. If the technique of political obligation is to be fully translated from abstract dream into living reality, speculation and research in these problems must provide the raw material with which the Court—and other agencies—are to work. For these raw materials to be supplied most efficiently, there must be an understanding of the general patterns of thought presently actuating the formation of policy. Attention can then be focused on the points where the Court seems unsure of its facts, as in the flag salute problem and the segregation cases. Where the matter is too big for judicial cognizance, as in the case of irrational private discrimination in employment, legislation can be drafted to meet a need for affirmative action. State laws such as the poll tax laws, which are out of harmony with the policy now being evolved, can be reexamined in the light of that policy and perhaps brought into line by local action before actual intervention by Congress or the Court.

Too many earnest and able efforts to grapple with particular issues have been blunted by an essentially parochial viewpoint. The problems of minorities have been explored sympathetically but without sufficient emphasis upon the reasons why the whole community will suffer if solutions are not found. This paper represents an attempt to spell out those reasons: to state the large premises which, though perhaps of little immediate utility, may give baseline and direction to the efforts of the specialist—the lawyer, the social scientist, the novelist. The objective is not to codify, but to suggest the most fruitful lines of future work. "What's past is prologue."